

IMPORTANT NOTICE **NOT TO BE PUBLISHED OPINION**

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

FINAL

2008-SC-000718-MR

DATE 10/22/09 Kelly Klaber D.C.

THOMAS O. GOINS

APPELLANT

V.

ON APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
NO. 08-CR-00146

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Thomas O. Goins, was convicted in the Muhlenburg Circuit Court of first-degree possession of a controlled substance, tampering with physical evidence, possession of drug paraphernalia, and being a persistent felony offender in the first degree. He was sentenced to twenty years' imprisonment. He now appeals the conviction as a matter of right, Ky. Const. § 110(2)(b), raising a single issue for our review. He argues that he was denied a fair trial because the jury panel did not represent a fair cross section of the community.

Once the jury pool was assembled, but prior to voir dire, defense counsel objected to the composition of the panel on the grounds that it did not contain any African Americans. See RCr 9.34. The trial court overruled the objection.

Following the final verdict, defense counsel moved for a new trial pursuant to RCr 10.02, again challenging the composition of the jury panel. The trial court denied the motion, specifically noting that Appellant, who is also African American, had failed to demonstrate that systematic exclusion of African Americans had occurred in the selection of the jury panel. “[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.” Taylor v. Louisiana, 419 U.S. 522, 528 (1975). To demonstrate a prima facie violation of this Sixth Amendment requirement, a defendant must show:

- (1) that the group alleged to be excluded is a “distinctive” group in the community;
- (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
- (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979). Accepting for the sake of argument that African Americans are a distinctive group in Muhlenburg County, Appellant has nonetheless failed to demonstrate that they are underrepresented on jury panels or that systematic exclusion occurred.

“A showing of underrepresentation must be predicated on more than mere guesswork. Such a showing requires competent proof (usually statistical in nature).” United States v. Lara, 181 F.3d 183, 192 (1st Cir. 1999). In Commonwealth v. McFerron, this Court noted that “[t]he common thread

running through these cases on the proposition of making a *prima facie* case is that proof by taking evidence is required in the absence of a stipulation.” 680 S.W.2d 924, 927 (Ky. 1984). For example, in Smith v. Commonwealth, 734 S.W.2d 437 (Ky. 1987), the defendant presented a random sampling of the jury pool over a five-year period in an unsuccessful attempt to establish underrepresentation of women on jury panels. See also Ford v. Commonwealth, 665 S.W.2d 304, 308 (Ky. 1983) (where defendant’s reliance on statistical data and random sampling of past jury panels was insufficient to establish underrepresentation of women).

Here, Appellant submitted no competent evidence of underrepresentation or of systematic exclusion of African Americans on Muhlenburg County jury panels. No exhibits were appended to the motion for a new trial. When the motion was heard orally, defense counsel stated that African Americans constituted about four percent of the total population, but failed to credit this statistic to any reliable source. Further, there was disagreement between the Commonwealth and defense counsel as to how many African Americans were on the jury panel from which Appellant’s petit jury was selected; defense counsel insisted there was only one person while the Commonwealth stated that there was at least one. In denying the motion, the trial court noted that no evidence was presented that conclusively answered this question. Finally, no data was provided concerning past Muhlenburg County jury panels that would establish underrepresentation of African Americans. See Ford, 665

S.W.2d at 306-307, citing Moultrie v. Martin, 690 F.2d 1078, 1081 (4th Cir. 1982) (“Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time.”).

In short, Appellant did not present sufficient evidence of underrepresentation to establish a prima facie violation of his Sixth Amendment rights. See Dickerson v. Commonwealth, 174 S.W.3d 451, 462 (Ky. 2005). Nor did Appellant present any evidence that would indicate the underrepresentation was due to systematic exclusion. The absence of such evidence is fatal to any attempt to establish a constitutional violation and, therefore, the trial court properly overruled the objection to the composition of the jury panel and denied the motion for a new trial.

The judgment of the Muhlenburg Circuit Court is hereby affirmed.

All sitting. All concur.

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